



PHILIPS

Philips Electronics

Thomas B. Patton
Vice President
Government Relations

July 2, 2004

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

Re: In the Matter of Digital Output Protection Technology and Recording Method
Certifications: MB Docket Nos. 04-64 (Digital Transmission Content Protection),
04-62 (Content Protection Recordable Media for Video Content) and 04-61 (High
Bandwidth Digital Content Protection).

Dear Ms. Dortch:

This letter elaborates upon a presentation made by Philips to the Commission's Media Bureau staff on May 28, 2004, and responds to the staff's request for additional information relating to the use of non-asserts and patent disclosure requirements.¹ In doing so, it also responds to the principal arguments made in a June 1, 2004 *ex parte* submission filed by the Digital Transmission Licensing Administrator, LLC ("DTLA"),² and in the Replies to Philips' Oppositions to the Certifications by the DTLA, the 4C Entity LLC ("4C"), and the Digital Content Protection LLC ("DCP").³

¹ This presentation also was distributed at May 28 and June 14, 2004 meetings with Legal Advisors to Chairman Powell and Commissioners Copps, Abernathy and Adelstein.

² See Letter from Seth D. Greenstein to Marlene H. Dortch, written Ex Parte Presentations in Docket MB 04-64, In the Matter of Digital Output Protection Technology and Recording Method Certifications: Digital Transmission Content Protection (June 1, 2004).

³ See In the Matter of Digital Output Protection Technology and Recording Method Certifications: Digital Transmission Content Protection, MB Docket 04-64, Reply of Digital Transmission Licensing Administrator LLC Supporting Certification of DTCP (April 16, 2004) ("DTLA Reply to Oppositions"); In the Matter of Digital Output Protection Technology and Recording Method Certifications: CPRM-Video, MB Docket 04-62, Reply of 4C Entity, LLC Supporting Certification of CPRM-Video (April 16, 2004) ("4C Reply to Oppositions"); In the Matter of Digital Output Protection Technology and Recording Method Certifications: High

(continued...)

At the outset, Philips wishes to reiterate that it does not seek to block Federal Communications Commission approval of the DTCP, CPRM or HDCP digital content protection technologies under the Commission's Broadcast Flag Report and Order. Philips recognizes that each of these technologies is an important first generation technology in the fight to prevent indiscriminate redistribution of digital broadcast content over the Internet. Moreover, manufacturers will have no choice but to license these technologies to build Broadcast Flag-compliant products because there is no current substitute to protect the links in the chain of custody covered by these technologies.⁴ Philips seeks only to require that the licenses for these technologies comply with well-established Commission policy,⁵ reflected in the practices of standard setting bodies⁶ and made an express part of the Broadcast Flag regulations,⁷ namely that they provide for licensing on reasonable and nondiscriminatory terms and conditions. Thus, Philips asks the Commission to condition approval of these technologies on changes to only three provisions in these lengthy licenses which clearly fail to meet the legal requirements of reasonable and nondiscriminatory licensing.⁸

Such approvals must be conditioned on reform of these license provisions for a very simple and fundamental reason: failure to do so would eviscerate the carefully constructed regulatory regime established by the Commission in its Broadcast Flag Order. At the very heart of that Order was a Commission determination that "no industry segment exercise a significant degree of

(...continued)

Bandwidth Digital Content Protection, MB Docket 04-61, Reply of Digital Content Protection, LLC Supporting Certification of HDCP (April 16, 2004) ("DCP Reply to Oppositions").

⁴ DTCP protects compressed video content over the IEEE 1394 link; CPRM protects content for recording on DVD-R, DVD-RW and DVD-RAM formats; HDCP protects uncompressed video content to displays.

⁵ See Revised Patent Policies of the Federal Communications Commission, *Public Notice*, 3 FCC 2d 26 (1961).

⁶ See for example, Guidelines for the Implementation of the ANSI Patent Policy, Updated March, 2003, <http://www.ansi.org>; IEEE-SA Standards Board Bylaws, <http://standards.ieee.org/guides/bylaws/sect6-7.html>; ITU-T: <http://www.itu.int/ITU-T/dbase/patent/patent-policy.html>; ITU-R: <http://www.itu.int/ITU-R/study-groups/patents/practice/index.html>; TIA Patent Policy, http://www.tiaonline.org/standards/sfg/2001engineering_manual_detail.cfm?id=3&subid=5; SDR Forum, Bylaws of the SDR Forum, Article 4.8.3, http://www.sdrforum.org/about_sdr/by_laws.html.

⁷ See In the Matter of Digital Broadcast Content Protection, MB Docket 02-230, Report and Order and Further Notice of Proposed Rulemaking at ¶ 53 (November 4, 2003) ("Broadcast Flag Report and Order"); 47 C.F.R. § 73.9008(a)(4).

⁸ The Commission also should address a number of additional concerns set forth in Philips Oppositions.

control over decisions regarding the approval and use of content protection and recording technologies in DTV-related equipment.”⁹ That principle is essential to promote competition and innovation. Absent reform of the DTCP, CPRM and HDCP licenses, that vital element of the Commission’s Order will be seriously undermined.

At bottom then, the Commission must condition approval of these technologies on specific, targeted changes to their licenses to protect the integrity of the Commission’s Broadcast Flag mandate. The Commission already has entered the marketplace and stretched to the outermost boundaries of its authority to regulate it.¹⁰ Having done so, the Commission cannot simply step back and “let the marketplace work” to destroy the very foundation of its Broadcast Flag Order. Instead, the Commission must enforce its requirement of reasonable and nondiscriminatory licensing.

I. THE NON-ASSERT PROVISIONS IN THE DTCP, CPRM AND HDCP LICENSES VIOLATE THE BROADCAST FLAG ORDER’S REQUIREMENT THAT TECHNOLOGIES BE LICENSED ON REASONABLE AND NONDISCRIMINATORY TERMS AND CONDITIONS

Philips’ concerns about the Non-Assert provisions, articulated in far greater detail in its Oppositions,¹¹ are fundamental. The Non-Assert provisions are not reasonable because they require licensees to surrender their own intellectual property without any compensation in order to comply with a government mandate, the purpose of which is to protect other parties’ intellectual property. This provision undermines the very essence of the constitutionally protected system of patents which is the expectation that an individual or company that invests in research and development resulting in patents should be able to realize value from those patents

⁹ Broadcast Flag Report and Order at ¶ 52.

¹⁰ See Broadcast Flag Report and Order at ¶¶ 29-30. A challenge based principally on whether the Commission lacked the authority to promulgate the Broadcast Flag regulations is pending in the Court of Appeals for the D.C. Circuit. See *American Library Association, et al., Petitioners v. Federal Communications Commission and United States of America, Respondents; National Cable and Telecommunications Association, et al., Intervenor*s, Docket No. 04-1037, United States Court of Appeals for the D.C. Circuit, 2004 U.S. App. LEXIS 10603.

¹¹ See In the Matter of Digital Output Protection Technology And Recording Method Certifications: Digital Transmission Copy Protection, MB Docket No. 04-64, Opposition of Philips Electronics North America Corporation at 15-21 (April 6, 2004); In the Matter of Digital Output Protection Technology And Recording Method Certifications: Content Protection Recordable Media for Video Content, MB Docket No. 04-62, Opposition of Philips Electronics North America Corporation at 15-21 (April 6, 2004); In the Matter of Digital Output Protection Technology And Recording Method Certifications: High Bandwidth Digital Content Protection, MB Docket No. 04-61, Opposition of Philips Electronics North America Corporation at 12-17 (April 6, 2004).

in the form of reasonable royalties. Otherwise, the incentive to innovate is destroyed.¹² At a minimum, in the case of the CPRM license, this is a very real concern for Philips because Philips has blocking patents, as previously disclosed to the Commission and the 4C licensors.¹³

Moreover, the Non-Assert provisions are discriminatory because they fail to treat fairly the class of licensees consisting of companies that are both digital product manufacturers and technology companies investing substantial sums in digital content protection technologies. The impact of the Non-Assert provisions falls far more heavily, *i.e.*, in a discriminatory fashion, on these licensees than on licensees that are just manufacturers or just inventors, but not both. In an analogous regulatory context, the Court of Appeals for the D.C. Circuit has held that uniform treatment of dissimilarly situated entities constituted unlawful discrimination.¹⁴

The justifications for the Non-Assert provisions offered by DTLA, 4C and DCP, respectively, fail to establish that these Non-Assert provisions meet the reasonable and nondiscriminatory licensing requirement of the Broadcast Flag regulation. Moreover, they raise far more questions about the Non-Asserts than they answer.

The respective licensing authorities make four principal arguments in support of the Non-Assert provisions: (1) they lower the overall cost of licensing, in part because they insulate against patent infringement litigation; (2) there is precedent for Non-Assert provisions; (3) large numbers of licensees have agreed to such provisions; and (4) it is too late to change them. Each contention is lacking in merit.

¹² The Licensors claim that their Non-Asserts are narrow, and thus will not interfere with future research. They argue, essentially, that it is permissible to confiscate intellectual property created in the past because that will not destroy the incentive to innovate in the future. By that logic, of course, there would be no need to protect existing motion pictures against copyright infringement, only motion pictures not yet created. Such reasoning is incompatible with the very foundations of our intellectual property system. Moreover, companies that engage in research in a field typically justify and fund ongoing innovation from revenues from past innovation in that field, so Non-Asserts will have a direct impact on future innovation. Finally, as discussed below, in Part II, the Non-Asserts are not as narrow as claimed, and are subject to expansion as the applicable specifications change.

¹³ See October 22, 2003 Letter from Thomas Patton to Chairman Powell at 5, MB Docket No.02-230.

¹⁴ In *Alabama Electric Cooperative, Inc. v. Federal Energy Regulatory Commission*, 684 F.2d 20 (D.C. Cir. 1982), the court reasoned that a uniform rate design violated the requirement that rates be just, reasonable and nondiscriminatory where purchasers of power were not similarly situated. Here, akin to the *Alabama Electric Cooperative* case, the disparate costs of licensing for dissimilarly situated licensees (those required to give a Non-Assert and having intellectual property rights and those required to give a Non-Assert and having no intellectual property rights) render the Non-Assert provisions discriminatory, in violation of the Broadcast Flag Order.

A. Licensors Provide No Data To Support Their Contention That The Non-Assert Results In Substantially Reduced License Fees

Licensors offer not one scintilla of evidence to support their assertion that the licensing fees are substantially lower because of the Non-Assert provisions than they otherwise would be if licensing were done on reasonable and nondiscriminatory terms and conditions. In fact, the Vidi license offered by Philips based upon reasonable and nondiscriminatory licensing has fees that are lower in most categories and lower overall than the comparable fees in the CPRM license.¹⁵ A mere assertion of substantially lower cost absent clear and convincing data to prove it falls far short of what is necessary to sustain licensors' burden of proving the Non-Asserts meet the reasonable and nondiscriminatory licensing requirement. Moreover, lower costs alone are not sufficient to offset the clearly unreasonable and discriminatory effect of this provision.¹⁶ To the extent license fees may be lower, that result flows from the subsidization provided by licensee patent holders compelled to surrender their IP rights as a condition of signing the license containing the Non-Assert provisions.

The notion that such Non-Asserts insulate against litigation also is largely fallacious. Only digital product manufacturers covered by the Broadcast Flag Order would be required to sign the DTCP, CPRM and HDCP licenses, assuming FCC approval. Other patent holders that are not manufacturers would be free to assert their patent rights against licensors and licensees alike. Such litigation risk, notwithstanding the Non-Assert provisions, is vividly illustrated by the massive patent litigation involving consumer electronics manufacturers arising out of the V-Chip.¹⁷ A Non-Assert in that instance would have done nothing to affect such litigation because the patent holder was not a TV set manufacturer.

¹⁵ Vidi is lower cost for all licensees, except for data drive manufacturers. The most significant differences are: The annual fee for implementers of CPRM is \$12,000 per application. Vidi does not require payment of annual fees from implementers. The fee per blank CPRM disc is \$0.02, the fee per blank Vidi disc is Euro 0.01. Software implementers pay 750 Euro per Vidi application for an unlimited number of installations. The fee for software implementations of CPRM is \$0.10 per installation up to \$50,000 per application version. The fee for CPRM recorders is \$0.10 per product. The fee for Vidi recorders is Euro 0.05 per product. CPRM does not ask a fee from PC drives. The fee for Vidi is Euro 0.05 per drive.

¹⁶ In seeking to establish the reasonableness of patent license fees, the courts have not simply settled on "low cost" as a determinative factor. Instead, courts have employed a non-exclusive list of as many as fifteen factors including the granting of licenses under special conditions designed to preserve the patent monopoly, and whether the licensor and licensee are direct competitors in the same territory or line of business, both of which are relevant here. *See Georgia-Pacific Corp. v. United States Plywood Corp.*, 318 F.Supp. 1116, 1120 (S.D.N.Y. 1970).

¹⁷ *See, e.g., Sony Elecs., Inc. v. Soundview Techs., Inc.*, 225 F. Supp. 2d 164 (D. Conn. 2002).

B. Applicable Precedents Do Not Justify The Non-Assert Provisions As Consistent With Reasonable and Nondiscriminatory Licensing

The precedents relied upon by licensors to sustain their Non-Assert provisions are circular, scant and distinguishable. Each licensing authority relies principally on the other two licenses that are being challenged here.¹⁸ For example, DTLA points to CPRM and HDCP. The fact that each of these licenses contains a Non-Assert provision is hardly proof that they are reasonable and nondiscriminatory. It is just circular and self-serving argumentation. Licensors offer no evidence that the Non-Assert provisions in these licenses have been blessed by any regulatory agency, court or the Department of Justice. If they sought clearance from the DoJ in the form of a Business Review letter, they neither mention nor provide it.

Licensors cite other Business Review Letters,¹⁹ including one involving Philips, where a Non-Assert provision was used. In each instance, however, the Non-Asserts were used to clear away a “thicket of patents” incident to a patent pool. In such circumstances, all parties having patents are invited to participate in the patent pool and share in the royalties. Here, however, both DTLA and 4C expressly disclaim the existence of a patent pool and have refused to allow others with relevant patents to participate as licensors.²⁰

Moreover, none of the licensing authorities identify even a single patent they hold in the DTCP, CPRM or HDCP technologies.²¹ Thus, the record before the Commission gives rise to an inference that licensors may be requiring licensees to relinquish valuable patent rights where licensors possess none themselves. Little could be more unreasonable and discriminatory. If licensors wish to defeat that inference, it is incumbent upon them to identify the patents that they

¹⁸ They also point to the CSS license, drafted primarily by 4C and 5C member companies MEI and Toshiba, the original CSS licensors.

¹⁹ See DTLA Reply to Oppositions at 40.

²⁰ See DTLA Reply to Oppositions at 32; 4C Reply to Oppositions at 12. In other words, DTLA and the 4C expressly disclaim the primary potential pro-competitive benefit of joint licensing – the resolution of blocking patent positions, while leaving the public with all of the potential anti-competitive risks of such joint action – conferring advantages on insiders (admitted by DTLA, Reply to Oppositions at 45), potential adverse effect on related product markets, etc.

²¹ See In the Matter of Digital Output Protection Technology and Recording Method Certifications: Digital Transmission Content Protection, MB Docket No. 04-64 (March 1, 2004) (“DTCP Certification”); In the Matter of Digital Output Protection Technology and Recording Method Certifications: Content Protection Recordable Media for Video Content, MB Docket No. 04-62 (March 2, 2004) (“CPRM Certification”); See In the Matter of Digital Output Protection Technology and Recording Method Certifications: High Bandwidth Digital Content Protection, MB Docket No. 04-61 (March 1, 2004) (“HDCP Certification”).

know would be the subject of “necessary claims” as defined in their respective licenses.²² Absent an identification of such patents, licensees are in the untenable position of not having sufficient information to even be able to assess how to proceed. By contrast, in the DFAST license, a specific patent was identified.²³

By contrast, the Commission, following the lead of the courts and standard setting bodies, has ordained that licensing be on a reasonable and nondiscriminatory basis.²⁴ That litmus test is drawn from the overwhelming majority of commercial licenses which utilize the reasonable and nondiscriminatory or RAND formulation for licensing. Indeed, in licensing practice, a Non-Assert provision is an antonym to RAND. It is not mere happenstance that in the DFAST license, the RAND formulation as opposed to a Non-Assert provision, was utilized.²⁵

Importantly, the landmark Microsoft antitrust litigation casts a large cloud over the propriety of uniform, Non-Assert provisions. The Windows license at issue in the Microsoft case

²² A suggested patent identification requirement to implement the reasonable and nondiscriminatory licensing obligation is appended hereto as Appendix A. Philips does not contend that there is a need for an independent patent assessment or exhaustive patent searches, part of the parade of horrors trotted out by DTLA. But each of the licensors certainly should know instantaneously the identity of their principal patents implicated by each technology. There is no basis to conceal them from the Commission or the public.

²³ *DFAST Technology License Agreement for Unidirectional Digital Cable Products (“DFAST License”)*, § 1.9, as attached to *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices and Compatibility Between Cable Systems and Consumer Electronics Equipment, Further Notice of Proposed Rulemaking*, 18 FCC Rcd 518 (2003).

²⁴ DCP has asserted that the Commission’s one sentence reference in its Plug and Play Order to the HDCP license as nondiscriminatory in response to Genesis Microchip’s criticisms is an acceptance of non-asserts as nondiscriminatory. This clearly was not the Commission’s intent, as evidenced by the very next sentence in that Order in which the Commission reemphasized its authority to scrutinize and reform unreasonable and discriminatory license terms. *See* DCP Reply to Oppositions at 12; *In the Matter of: Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, *Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, Second Report and Order and Second Further Notice of Proposed Rulemaking at ¶ 25 (October 9, 2003) (“Plug and Play Order”). Moreover, the focus of Genesis Microchip was principally on DVI and HDMI rather than HDCP. *See In the Matter of Implementation of section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80; *Commercial Availability of Navigation Devices, Compatibility Between Cable Systems and Consumer Electronics Equipment*, PP Docket No. 00-67, *Petition for Reconsideration of Genesis Microchip, Inc.* (December 29, 2003) at 7-9.

²⁵ DFAST License ¶ 3.5.

contained a Non-Assert provision. Competitors and the State parties complained about its anticompetitive effects. One competitor foreshadowed precisely the concerns Philips expresses about the Non-Assert provision here:

... requiring Sony to accept new “uniform provisions that may weaken Sony’s existing intellectual property protections and allow Microsoft to leverage its power into other markets is contrary to the underlying principles of the Proposed Judgment. Forcing all OEMs to accept identical Non-Assertion covenants fails to acknowledge or accommodate the important differences among companies regarding intellectual property portfolios and business activities in other markets.”²⁶

The Department of Justice responded to these concerns, amending its proposed consent decree:

[t]o the extent that anyone at Microsoft (or elsewhere) ever believed or conveyed to any OEM that Section III.I.5 of the RPFJ authorizes Microsoft to insist on broad patent Non-Assertion provisions, that belief was inaccurate.²⁷

In light of these antitrust concerns about its Non-Assert provisions, Microsoft has removed the Non-Assert provisions from its new contracts.²⁸ The use of Non-Assert provisions in prior contracts remains under antitrust scrutiny.²⁹ Significantly, in its license for Windows Media certified to the Commission under the Interim Broadcast Flag rules, Microsoft embraces RAND license terms.³⁰

The fate of the Non-Assert provisions in the context of the Microsoft antitrust case should be most instructive for the Commission here. Where the Commission is implementing its Broadcast Flag Order grounded on the fundamental premise of promoting competition and

²⁶ Letter to Ms. Renata Hesse, Antitrust Division, U.S. Department of Justice from Debra A. Valentine, O’Melveny & Myers LLP on behalf of Sony Corporation, Re: *United States v. Microsoft*, Civil Action No. 98-1232, 98-1233; January 28, 2002.

²⁷ See *United States v. Microsoft*, Civil Action No. 98-1232, Response of the United States to Public Comments On The Revised Proposed Final Judgment § IV(C)(3) (February 27, 2002).

²⁸ See *United States v. Microsoft*, Joint Status Report On Microsoft’s Compliance With The Final Judgment § II(B) (April 14, 2004).

²⁹ *Id.*

³⁰ See In the Matter of Digital Output Protection Technology and Recording Method Certifications: Windows Media Digital Rights Management Technology, MB Docket No. 04-66 (March 1, 2004) (“WMDRM Certification”) at 17.

innovation, it is difficult to imagine the Commission putting its imprimatur on a Non-Assert provision comparable to that which has been called into question and subsequently abandoned in perhaps the most significant antitrust case in American history.

C. The Fact That Others Have Signed The DTCP, CPRM and HDCP Licenses Containing Non-Assert Provisions Does Nothing To Establish Their Propriety

The argument that a large number of licensees have signed the DTCP, CPRM and HDCP licenses is not probative of their reasonableness or nondiscriminatory nature.³¹ Instead, it simply illustrates the market dominance and first mover advantage of these technologies. In fact, the DTCP, CPRM, and HDCP technologies each are, and have been, the only technologies available to manufacturers for their specific respective content protection “niches.” Indeed, any manufacturer that seeks to sell a product that will protect transmission of compressed digital video content over the IEEE 1394 interface must license DTCP – there is no competitive alternative. Similarly, any manufacturer that seeks to sell a product that will protect recordings in the DVD-R, DVD-RW, and DVD-RAM formats must license CPRM. And any manufacturer that seeks to sell a product that will protect transmission of uncompressed video to displays must license HDCP.

Rather than cutting in favor of licensors’ contentions, the state of the marketplace makes more imperative the need to ensure that licenses do not contain unreasonable and discriminatory conditions that impede the development of meaningful competition.

D. Providing Licensees With An Option of a Non-Assert or RAND Will Not Be Disruptive To the Digital Content Protection Market

The related contention that it is too late to drop the Non-Assert provision in favor of RAND is similarly unavailing. As discussed above, Microsoft did so in its licensing practices which were far more entrenched. Although there may be many signed licenses for DTCP, CPRM and HDCP for conditional access systems, there is not one signed license for these technologies pursuant to the Commission’s Broadcast Flag Order because the Commission has not yet approved these technologies for that purpose. We are at the beginning of the development of this marketplace, not at the end.

These licenses will be, for the first time in the context of the Broadcast Flag Report and Order, required by a direct government mandate. There can be no settled expectations on the part of licensors or licensees based upon prior experience in which the legitimacy of the Non-Assert provisions has not been tested against a regulatory obligation that licensing be on a reasonable

³¹ See e.g., DTLA Reply to Opposition at 42.

and non-discriminatory basis. If the Non-Assert provisions violate that requirement, the licenses must be reformed to comply with the law.³²

Finally, the concerns raised by Philips, Hewlett-Packard, the American Antitrust Institute and others can be addressed by giving DTCP, CPRM and HDCP licensees the option of selecting a Non-Assert provision or licensing on RAND terms. Suggested language for inclusion in a Commission Order is provided in Appendix B to this letter. The SmartRight license certified for Commission approval in this Broadcast Flag proceeding affords just such an option.³³

In sum, reform of the DTCP, CPRM and HDCP either to substitute RAND for the Non-Assert provisions, as was done in the DFAST license, or to provide a RAND option to licensees as an alternative to a Non-Assert provision, is necessary for these licenses to comply with the Commission's reasonable and nondiscriminatory licensing requirement. This requirement is the Commission's principal means of ensuring that the market for digital content protection technologies subject to government mandate develops in a manner that promotes competition and innovation. The Commission possesses the requisite authority to require that private contracts comply with its regulations.³⁴ It must exercise that authority here.

II. THE LICENSING AUTHORITIES' DEFENSES OF THE CHANGES PROVISIONS FOR THEIR RESPECTIVE LICENSES FAIL TO ADDRESS CORE ATTRIBUTES OF REASONABLE AND NONDISCRIMINATORY LICENSING

The principal justification for the Changes provisions offered by the respective licensing authorities is that they are very narrow and have been utilized to date in a beneficent manner. In short, "trust us." That is not a sound basis for ensuring compliance with the requirement of reasonable and nondiscriminatory licensing. Nor is it accurate.

The most dramatic evidence of the breadth of the Changes provisions is the clause in the DTCP license permitting the specification to be expanded for use with new transports, such as

³² See *Building Owners and Managers Association International v. FCC*, 254 F.3d 89, 95-96 (D.C.Cir. 2001) (Court upheld Commission authority to invalidate private home owner association covenants and leasing contracts that violated regulations conferring rights on consumers to use over-the-air reception devices for purposes of receiving direct broadcast satellite service.)

³³ See *In the Matter of Digital Output Protection Technology and Recording Method Certifications: SmartRight*, MB Docket No. 04-60 (March 1, 2004) ("SmartRight Certification") at App. A ("SmartRight Agreement") at § 5.5.

³⁴ See n. 32 *supra*.

DTCP-IP,³⁵ and permitting open-ended changes to the Compliance Rules where “necessary to ensure and maintain content protection.”³⁶

Allowing DTCP-IP to be implemented pursuant to the Changes clause demonstrates its extraordinary elasticity. This is not simply a material change. It is in many respects a new system that has not even been completely defined, as evidenced by the DTLA’s failure to state complete parameters for local proximity controls in its certification or subsequent *ex parte* submissions.

Moreover, the DTCP-IP example illustrates the interconnected nature of the Changes and Non-Assert provisions of the DTCP license. If DTCP-IP could be implemented pursuant to the Changes provisions and the Non-Assert were to remain, the combined effect would be to compel licensees to surrender their intellectual property rights regarding entirely different areas of technology not encompassed in the base content protection technology. DTCP was designed expressly for wired networks. DTCP-IP is a technology for wireless networks. Again, Philips’ concern here is concrete. As content providers know, Philips is engaged in extensive research and development in the area of local proximity controls, a subject of paramount importance to the content community.³⁷ The incentive for Philips and other technology companies that also manufacture digital products to innovate in this important new area would be destroyed if such companies were forced to relinquish their rights to realize value from such innovation through operation of the Changes and Non-Assert clauses in the basic DTCP license. Other innovative improvements to DTCP, CPRM and HDCP by licensees are similarly at risk of being captured by the Non-Assert provision as a result of changes adopted by licensors in the future. If one of the licensees of DTCP or CPRM creates an innovation useful in DTCP or CPRM or develops an innovative new system that competes with DTCP or CPRM, the licensors of DTCP or CPRM can

³⁵ *DTCP Certification*, App. 2, Proposed Adopter Agreement (“Adopter Agreement”) at § 3.3

³⁶ *Id.* at § 3.3.3

³⁷ *See, e.g.*, Letter from Fritz Attaway, Motion Picture Association of America, to Marlene H. Dortch, written *Ex Parte* Presentation in CS Docket No. 97-80, Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices; PP Docket No. 00-67, Compatibility Between Cable Systems and Consumer Electronics Equipment; and MB Docket No. 02-230 (March 19, 2004); Letter from Lawrence R. Sidman, Counsel to Thomson, and Bruce E. Boyden, Counsel to MPAA to Marlene H. Dortch, written *Ex Parte* Presentation in MB Docket No. 04-59, In the Matter of Digital Output Protection Technology And Recording Method Certifications: SmartRight (June 17, 2004).; Letter from Frank Hawkins, Senior Vice President of Business Affairs, National Football League to Marlene H. Dortch, written *Ex Parte* Presentation in MB Docket No. 04-63, In the Matter of Digital Output Protection Technology And Recording Method Certifications: TivoGuard Digital Output Protection Technology, and 04-65, In the Matter of Digital Output Protection Technology And Recording Method Certifications: Helix Device DRM Trusted Recorder and Helix Device DRM Technology (June 24, 2004).

take these innovations and include them in DTCP or CPRM without any compensation to the innovator.

Any claim to the narrowness of the Changes clause is belied by the provision that permits changes to the Compliance Rules “where necessary to ensure and maintain content protection.”³⁸ As the Commission recognized in promulgating its Broadcast Flag Order, the Compliance rules are in many respects the most important aspect of a digital content protection technology license with far-reaching implications for consumers and all industry stakeholders. In the DTCP license’s Compliance Rules, almost any change imaginable can be characterized as “necessary to ensure and maintain content protection,” negating any other limitations.

The very expansiveness of these Changes provisions highlights their most conspicuous defect: the absence of any dispute resolution mechanism. Under these Changes provisions, licensees have varying levels of opportunity to comment on Changes but ultimately must accept them if the licensors insist upon them. The “cram-down” aspect of the Changes provisions is contrary to the fundamental fairness that inheres in reasonable and nondiscriminatory licensing. It stands in marked contrast to the DFAST license which provides for an appeal of Changes to the Commission and time frames for implementation of changes consistent with the appeals procedure.³⁹

In fact, the Vidi and SmartRight licenses certified to the Commission pursuant to the Broadcast Flag Order each offer a model for how to craft change management provisions. Notably, both licenses include provisions utilizing arbitration to resolve disputed changes.⁴⁰ Licenses that fail to provide meaningful dispute resolution mechanisms to address changes fail to meet the requirement of reasonable and nondiscriminatory licensing.

Accordingly, the Commission should condition approval of the DTCP, CPRM and HDCP licenses upon incorporation into those licenses’ Changes provisions of elements essential to meet the regulatory test of reasonable and non-discriminatory licensing, namely: (1) reasonable notice of changes being considered; (2) meaningful opportunity for comment and objection; (3) dispute resolution by an independent party, *e.g.*, arbitration; and (4) reasonable implementation time following resolution of disputed changes.

³⁸ Adopter Agreement at § 3.3.3.

³⁹ DFAST License, Section 6.

⁴⁰ See Vidi Agreement at § 6.3.5; SmartRight Agreement at § 3.3.4.

III. LICENSOR VETO OF FCC-APPROVED DOWNSTREAM DIGITAL BROADCAST CONTENT PROTECTION TECHNOLOGIES IS INCONSISTENT WITH REASONABLE AND NONDISCRIMINATORY LICENSING

Both DTLA and 4C continue to insist on their right to veto the use of downstream technologies even if the Commission has approved them.⁴¹ At the same time, they suggest that such rejection in the face of Commission approval is unlikely.⁴² Again, this is a variant on the licensing authorities' theme of "trust us." Yet, apparently, they do not trust sufficiently the Commission's approval process under the Broadcast Flag Order to abide by the Commission's approval of other digital broadcast content protection technologies.

The insistence on the right to reject downstream technologies approved by the Commission directly contradicts the Commission's edict in the Broadcast Flag Order that no industry segment dominate selection and use of digital broadcast content protection technologies.⁴³ It creates an additional and needless entry barrier to competition in this evolving market. Contrary to DTLA's contentions, there are no technical problems with DTCP or CPRM handing off to another FCC-approved content protection technology. It is strictly a licensing issue.⁴⁴

The approach to FCC approved technologies adopted by DTLA and 4C stands in sharp contrast to the model contained in the Vidi, SmartRight and Windows Media licenses certified to the Commission, all of which accept all FCC-approved digital broadcast content protection technologies.⁴⁵ The MPAA and its member companies, which have played such a prominent role in the Broadcast Flag proceeding and are certainly vigilant regarding content protection, have not opposed the principle of automatic acceptance of FCC-approved technologies. Provisions in the DTCP and CPRM licenses that provide for their veto of FCC-approved downstream technologies cannot coexist with their requirement of reasonable and nondiscriminatory licensing. Their purpose and effect is to limit competition in the digital content protection marketplace.

⁴¹ See DTLA Reply to Oppositions at 47-50.

⁴² *Id.* at 47-48; 4C Reply to Oppositions at 17-18.

⁴³ Broadcast Flag Report and Order at ¶ 52.

⁴⁴ DTLA argues (Reply to Opposition at 49) that there may be some technologies that (i) are not intended to hand off to others, (ii) do not carry relevant CCI information to permit the hand-off, (iii) are intended to be part of a closed system that does not inter-operate, or (iv) require hooks in downstream technologies. However, none of these characteristics applies to either DTCP or CPRM. Thus, there is no technological reason DTCP or CPRM should not hand off to any other approved technology.

⁴⁵ See *Vidi Agreement*, Ex. A (Compliance and Robust Rules) at § A.1.2.2.1.; See *SmartRight Agreement*, Ex. B (Compliance Rules) at §§ 2.2(a)(iii), 2.2(b)(ii); *WMDRM Certification* at 20.

Ms. Marlene H. Dortch

July 2, 2004

Page 14

Accordingly, the Commission should condition approval of the DTCP and CPRM licenses upon a requirement that any FCC-approved digital content protection downstream technologies also would be approved for use with DTCP or CPRM.

IV. CONCLUSION

Philips does not seek to block FCC approval of the DTCP, CPRM or HDCP digital broadcast content protection technologies. Philips simply asks the Commission to enforce its reasonable and nondiscriminatory licensing requirement by conditioning approval of these technologies upon needed changes to a few specific provisions of these licenses. By so doing, the Commission will go a long way toward ensuring the development of a competitive and innovative digital broadcast content protection technology marketplace that was a primary objective of its Broadcast Flag Order.

Sincerely,

**PHILIPS ELECTRONICS NORTH AMERICA
CORPORATION**



Thomas B. Patton
Vice President, Government Relations

cc: Jon Cody
Stacy Fuller
Catherine Bohigian
Jordan Goldstein
Johanna Shelton
W. Kenneth Ferree
Rick Chesson
William Johnson
Susan Mort
John Wong
Mary Beth Murphy
Steven Broeckaert
Allison Greenwald
John Gabrysch
Jeffrey Neumann
Michael Lance
Amy Nathan
Alan Stillwell

APPENDIX A

Suggested Text Regarding Patent Identification

The proponent of a technology shall provide a list of issued United States Patents that: (i) must be infringed in order to use the proposed technology for the purposes for which it has been certified in connection with the Broadcast Flag regulation; (ii) are the subject of a grant of rights by a Licensor under the license agreements submitted to the Commission in connection with the Broadcast Flag regulation; and (iii) are believed in good faith by a Licensor to meet the criteria set forth in clauses (i) and (ii). Nothing in this requirement shall be construed to obligate proponents to obtain an independent expert evaluation of whether or not a patent meets criteria (i) and (ii) or to conduct a comprehensive review of a Licensor's patent portfolio.

APPENDIX B

Suggested Text For Condition Of Approval Relating To Non-Assert Provisions

Because we believe a mandatory reciprocal Non-Assert fails to satisfy the requirement of reasonable and non-discriminatory licensing within the specific context of the Commission's Broadcast Flag Report and Order, we will not approve a technology licensed under terms that require licensees to grant a reciprocal Non-Assert in exchange for the license from Licensors. Licenses may, in exchange for the license from Licensors, obligate Licensees to grant reciprocal licenses to their Necessary Claims on reasonable and nondiscriminatory terms. Licenses may also, in exchange for the license from Licensors, offer Licensees a choice of (i) granting a reciprocal Non-Assert in favor of Licensors and those other Licensees that agree to grant the same reciprocal Non-Assert, coupled with a RAND obligation in favor of all Licensees that do not choose to grant the reciprocal Non-Assert or (ii) agreeing to license their Necessary Claims on reasonable and nondiscriminatory terms. Licensors may choose to grant this option on an interface-by-interface (media-by-media or use-by-use) basis, or as a single option for all interfaces (media or uses). As new interfaces, media or uses are added the license, licensees that have agreed to grant a Non-Assert shall be given a choice of extending their existing Non-Assert or undertaking a RAND obligation with respect to the new material.